In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 156

EMMER F. REMMER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

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I. OPINIONS BELOW.

The *per curiam* opinion of the Court of Appeals, filed on May 23, 1955, is reported at 222 F. 2d 720 and is set forth at pages 339-40 of the Record. The prior opinion of the Court of Appeals, dated May 28, 1953, is reported at 205 F. 2d 277 and is set forth at pages 3748-77 of the Record in *Remmer v. United States*, No. 304, October Term, 1953. The Opinion, Findings, and Order of the

District Court, filed July 10, 1954, is not reported, but is set forth at pages 33-39 of the Record.

II. JURISDICTIONAL STATEMENT.

The Judgment of the Court of Appeals was entered on May 23, 1955 (R. 341). An order staying mandate pending disposition of the Petition for *Certiorari* was entered on June 3, 1955 (App. C, attached to the Petition for *Certiorari* herein). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254. The District Court had jurisdiction under 18 U.S.C., Section 3231, and Rule 18, Federal Rules of Criminal Procedure.

III. CONSTITUTIONAL PROVISIONS INVOLVED.

This case involves the right to trial by an impartial jury under due process of law, as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States, the pertinent portions of which read as follows:

Fifth Amendment:

"No person shall * * * be deprived of life, liberty, or property, without due process of law. * * *"

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. * * *"

IV. QUESTIONS PRESENTED

A. Where an outsider has informed a juror during a tax evasion trial that the defendant took $350,000 "under the table" on the sale of a business involved in the case, and has made a suggestion of bribery which the juror has reported to the trial judge, and the juror is thereafter interrogated by the FBI, can it be said that the presumption of prejudice was overcome when no effort was made to neutralize the "under the table" statement and the juror was not even questioned at the hearing as to the possible effect of this statement on his view of the defendant's guilt or innocence?

B. In such a situation, can it be said that the prejudicial effect of the bribery suggestion was overcome, when the FBI investigation was held in suspense until after the trial, and no report was made to the juror to the effect that defendant had not been connected with the bribery suggestion?

C. Does the evidence support the conclusion that the juror viewed such bribery proposal as a joke?

D. In view of the fact that, following the FBI's interrogation of the juror, the investigation was held in suspense until after the trial, and no report was made to the juror as to the results of the investigation or the conclusions reached, can it be said that the interrogation of the juror was harmless because it allegedly related to the conduct of a third party rather than the conduct of a juror?

E. Where a deputy marshal who is a personal friend of a juror informs the juror that an attempt had been

made to contact another juror, and no effort is made to counteract or neutralize this false statement, can it be said that the incident was harmless to the defendant?

F. Does the presumption of prejudice arising from private communications with a juror regarding a case require a new trial unless the evidence shows no reasonable possibility of prejudice, or is a new trial required only when the evidence actually shows prejudice in fact?

G. Does such presumption simply require the Government to come forward to establish the facts, without affecting the usual burden of proof on a motion for new trial, or does it require the Government to assume the burden of proving that there was in fact no prejudice?

H. Where, on the basis of an affidavit alleging private communications between a juror and (1) an outsider, (2) the trial judge, and (3) an FBI agent, this Court has remanded the case for a hearing, is the hearing limited to the effect of the communication between the juror and the FBI agent?

I. In such a situation, where the motion for such a hearing requests an inquiry as to all matters pertaining to the incident to determine to what extent it had any effect on the jury, is it within the scope of such hearing to show that a deputy marshal informed one of his juror friends that an attempt had been made to influence another juror?

V. STATEMENT OF CASE.

Petitioner was convicted in the District of Nevada on February 22, 1952, after a trial lasting almost three months, on four counts of tax evasion, of which two involved his returns for the years 1944 and 1945 and two involved the returns of his wife for the same years. The jury disagreed with respect to two other counts involving the returns of himself and his wife for 1946. The deliberations of the jury lasted two days.

Petitioner made a timely motion for new trial (R. 12-17) in which, among other things, he requested that a hearing be held to develop the full facts with respect to certain extraneous jury contacts indicated in the supporting affidavit (R. 3-12). The denial of that request for a hearing was held erroneous when the case was previously before this Court, and the matter was remanded to the District Court with instructions to hold a hearing and to determine whether "the incident complained of" was harmful to petitioner. *Remmer v. United States* (1954) 347 U.S. 450.

The District Judge assigned to conduct said hearing made an order on July 10, 1954, that the "incident complained of" was harmless. Thereafter, in August, 1954, petitioner filed a petition for rehearing with this Court requesting that the case be restored to the docket and that the other questions involved in the writ of *certiorari* be decided (No. 304, October Term, 1953). On January 10, 1955, this Court granted the petition for rehearing, restored the case to the docket, and remanded the whole record, including the findings and order of the judge who

conducted the hearing on the extraneous jury contacts, to the Court of Appeals —

> "• • • for its consideration on the errors assigned when the case was before the Court of Appeals before, in order that the Court on the whole record may reconsider the case in the light of our recent decisions in *Holland v. United States*, 75 S.Ct., 127; *Friedberg v. United States*, 75 S.Ct., 138; *Smith v. United States*, 75 S.Ct., 194; and *United States v. Calderon*, 75 S.Ct., 186, and Judge Goodman's findings and order.
>
> Mr. Justice Black would reverse the judgment of conviction and grant a new trial in view of the jury incident discussed in *Remmer v. United States*, 347 U.S. 227, 74 S.Ct., 450, 98 L.Ed. 654."
>
> *Remmer v. United States* (1955) 348 U.S. 904.

The Court of Appeals thereafter authorized the filing of concurrent supplemental briefs limited to the net worth issues. On petitioner's motion for permission to file *seriatim* briefs and to submit oral argument on the questions raised by the hearing on the extraneous jury contacts, the Court of Appeals enlarged the scope of the concurrent briefs to include the jury contact questions but ordered the case submitted without oral argument (R. 337-9). The judgment of the District Court was affirmed in a *per curiam* opinion dated May 23, 1955, which did not discuss any of the issues in the case (R. 339-40).

The order granting the Petition for *Certiorari* limits the case to the questions presented by the extraneous jury contacts. *Remmer v. United States* (1955) 350 U.S. 820.

The facts developed at the hearing conducted pursuant to the previous remand ordered by this Court show that there were four extraneous contacts with jurors during the course of the trial. One was between the jury foreman, I. J. Smith, and a James Satterly. A second was between Smith and the Trial Judge. The third was between Smith and FBI agent Callister. The fourth was between juror Richard J. Curnow and a deputy United States Marshal. The first three contacts were indicated in the newspaper stories which were made a part of the affidavit in support of the motion for new trial (R. 6-12) and were mentioned in the prior opinion of this Court. *Remmer v. United States* (1954) 347 U.S. 227, 228. The fourth contact between juror Curnow and the deputy United States Marshal was not known to petitioner or his counsel until 1953 (R. 200-202).

The actual circumstances and content of these communications did not become known to petitioner or his counsel until June, 1954, when the hearing requested in February, 1952, was finally conducted pursuant to order of this Court; and at that time the testimony suffered from the inevitable erosion of memory during the intervening two and a half years. As developed in the Record, however, the following circumstances occurred.

On December 18, 1951, after the trial had been in progress approximately three weeks, jury foreman Smith was visited in his home one evening by James Satterly, who was a personal friend and an insurance client of Smith. Satterly discussed some changes in his automobile insurance policy and there was also talk about an accident he had had (R. 50). Satterly had worked as a crap-dealer

in various gambling establishments in Reno, Nevada, and Smith knew that he was an ex-convict (R. 168). During the course of the discussion, Satterly commented on Smith's status as a juror and made the following statement (R. 167):

> "I know Bones Remmer very well. He sold Cal-Neva for $850,000 on top of table—believe he got $350,000 under the table—Has about $300,000 that he daresn't touch—Why don't you make a deal with Bones?"

Smith noticeably raised his voice in replying that he was forbidden by the instructions of the judge to discuss the case (R. 128).

Two days later, on December 20, 1951, Smith reported this incident to Trial Judge Foley and quoted Satterly as having made the following statement (R. 134):

> "I know Bones Remmer. You are a member of the jury. Why don't you make a deal with him?"

After advising Smith that Satterly might have been joking (R. 81, 134), Judge Foley held a meeting with Assistant United States Attorney Thompson and perhaps other members of the prosecution staff. At this meeting, it was decided to investigate the incident to see whether it had any connection with the defense, and it was also decided not to inform defense counsel in order not to frustrate the investigation (R. 135-7, 227-8).

Accordingly, on December 22, 1951, FBI agent Callister called on Smith and stated that he had been requested to conduct an investigation relating to Smith's talk with Satterly to determine whether an attempt had been made to exert any influence on Smith as a juror

(R. 58, 152, 169-70). Callister made notes of what Satterly had said to Smith and of Smith's relationship with and knowledge of Satterly, and of the fact that Satterly was moving to another state (R. 166-8).

On December 24, 1951, without having interviewed Satterly, FBI agent Callister reported to Assistant United States Attorney Thompson that there was nothing to indicate a connection between Satterly and the defense, and on Thompson's instructions he gave a similar report on January 4, 1952, to Judge Foley, who told him that "no further investigation was required at that time." (R. 157-8, 230, 233.)

Accordingly, the investigation was held in abeyance and no further work was done on it until approximately March 10, 1952, after petitioner had been convicted. At that time, in a meeting between Callister and Thompson, it was decided to terminate the investigation (R. 158, 230). No further information was conveyed to Smith at any time (R. 261). Thus, he was held in suspense throughout the trial as to the results of the investigation or whether it had been completed; and no effort was made to neutralize the effect of Satterly's false statements that he knew Remmer well[1] and that Remmer had received "under the table" money on the sale of Cal-Neva. Nor was any inquiry made as to the impact on Smith of the "under the table" statement. On the contrary, the Trial Judge and the prosecutors were interested only in determining whether the defense had attempted to tamper with the jury (R. 137, 228).

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[1]Satterly testified at the hearing in June, 1954, that he knew petitioner only by sight, and not personally (R. 118).

At no time did either the Judge or the prosecutors give any of this information to defense counsel.

And at the hearing in June, 1954, the fact that Satterly had made this statement regarding the Cal-Neva sale was not disclosed while Smith was on the witness stand; and he was not recalled, after the development of this fact through Callister's testimony, for questioning as to the possible impact of this statement on him, nor was any effort made to inquire further into this phase of the matter. The District Judge made a finding that this remark about "under the table" money had been made (R. 34) but concluded, without any statement of his reasons or recital of facts upon which he relied, that the statement was harmless (R. 39).

On the way home from the Court immediately after the verdict on February 22, 1952, Smith told juror Tinkham that it was possible he had been approached (R. 184), and he thanked juror Mack for finding Remmer guilty and said that someday he would tell her why he was so interested (R. 174, 177-8). Two weeks later, when he encountered alternate juror Morris, he related that he had been told during the trial that he could make a lot of money by stringing along with Remmer (R. 221).

In view of Satterly's statement to Smith that petitioner received $350,000 "under the table" on the sale of Cal-Neva, it is noted that petitioner's connection with Cal-Neva throughout the prosecution period was prominently mentioned in the trial (e.g., see pages 1593-6, 1903-17, 1925-35, 2218-21, 3027-36, 3073-4, 3111-16, 3602-6, 3612-13 of the Record on file with this Court as No. 304, October Term, 1953). His subsequent sale of Cal-Neva was also

brought to the jury's attention a number of times (e.g., see pages 1930-3 and 3029-36 of the Record on file with this Court at No. 304, October Term, 1953).

Satterly, incidentally, categorically denied at the hearing that the incident described by Smith had ever occurred, and this denial was supported by the testimony of his wife, who was present during the conversation in which the incident occurred (R. 114, 118-9, 125).

During the trial, probably in January, 1952, juror Curnow and Deputy United States Marshal Boyd had a conversation which led Curnow to believe that an attempt had been made to contact one of the jurors, and that the juror involved was probably Mrs. Mack. On March 23, 1954, Curnow gave FBI agent McGee an affidavit (Ex. F, R. 210-11) reciting that during the trial Deputy Marshal Boyd had asked him if he had heard of anyone on the jury being contacted, or had heard any discussion among the jurors indicating that a juror had been contacted; that he had replied to Boyd in the negative; that at the time he had thought Boyd's remark related to juror Mack, since he had seen her going into the Judge's chambers; that later (it does not appear when) he had learned that Mrs. Mack had been discussing an illness problem with the Judge; and that these facts had not influenced his decision.

Curnow told one of the defense attorneys in December, 1953, that an assistant marshal had asked him, about half way through the trial, if anyone had tried to approach him on the case and that, when Curnow asked why he was inquiring, the assistant marshal had stated: "He tried to bribe one of the jurors." (R. 265.)

At the hearing in June, 1954, Curnow testified that one of the marshals asked him if he had heard any discussion by the jurors about anyone being approached; that he replied in the negative and asked why the question had been put to him; and that the marshal replied that he was just curious (R. 200). He first testified that he was uncertain as to which marshal had spoken to him (R. 203), but after his FBI affidavit was produced, he identified Boyd as the one who had talked to him, and conceded that he had known Boyd personally for several years (R. 208).

Boyd testified that he had known Curnow personally since 1948 and had participated with him in rifle and pistol shooting contests, and that during the trial he had talked to Curnow "concerning shooting" several times, but denied that he had ever had any conversation with Curnow regarding attempts to contact jurors (R. 249-252).

VI. SUMMARY OF ARGUMENT.

The extraneous communications were obviously prejudicial to petitioner. A man purporting to be his friend advised the jury foreman, in substance, that petitioner was a tax evader, and suggested that a "deal" be made. No effort was made at any time to neutralize these statements. The jury foreman was not even questioned at the hearing regarding the tax evasion allegation, nor was this portion of the extraneous communication mentioned in his discussion with the Trial Judge. The seriousness of the "bribery" suggestion was emphasized by the fact

that the FBI interrogated the juror during the trial, but never informed him that petitioner had no connection with the proposal.

There was a real danger of intimidation of the jury foreman in the fact that, after he was interrogated, the FBI held its investigation in suspense until after the verdict and thus continued to look over his shoulder during the remaining two months of the trial.

The deputy marshal's statement to one of his juror friends that jury tampering had been attempted was likewise never neutralized.

In holding that no harm to the petitioner had been shown, the District Court failed to apply the rule of law announced by this Court in *Remmer v. United States* (1954) 347 U.S. 227; and in numerous Appellate Court decisions, that there is a presumption of prejudice which the government must overcome by an affirmative showing of no prejudice. The District Court instead viewed the presumption of prejudice only as requiring the Government to present the evidence and considered that thereafter the situation was the same as in any motion for new trial—namely, that no new trial would be granted unless the evidence affirmatively showed prejudice as an actual fact. The correct rule is that extraneous communications relating to the case require a new trial unless it affirmatively appears that there is no reasonable possibility that the defendant was prejudiced.

The District Court also misconstrued the mandate of this Court, and erroneously considered that the scope of the hearing was limited to the communication between the FBI agent and the jury foreman. The remand was

ordered by this Court, however, for the purpose of developing all of the circumstances relating to the invasion of petitioner's right to trial by an impartial jury: and the impact of Satterly's statements to the jury foreman is just as important as the effect of the FBI investigation. Likewise, the inquiry which the deputy marshal made of another juror and the misinformation which he gave that juror that an attempt had been made to influence another juror, were also related to petitioner's request for a hearing and therefore within the scope of the hearing.

VII. ARGUMENT

There were three extraneous communications regarding the case with juror Smith (the foreman) and one with juror Curnow. Since the hearing at which the facts were developed was not held until two and a half years later, the evidence is not as clear-cut in its details as it might have been. However, it clearly establishes the substance of what was said and done, and, to the extent that it is vague and uncertain, the doubts must be resolved in favor of petitioner, both because the presumption of prejudice runs in his favor and because respondent itself (together with the Trial Judge) is responsible for the long delay in holding the hearing.

The conclusion of the lower Court that these extraneous contacts did not prejudice petitioner is incorrect for the following reasons: (a) The evidence does not overcome the presumption of prejudice; (b) the District Court applied incorrect rules as to the effect of the presumption

of prejudice; and (c) the lower Court misconstrued the scope of the hearing ordered by this Court.

A. THE PRESUMPTION OF PREJUDICE WAS NOT OVERCOME.

In the prior opinion in this case, the rule that an extraneous contact with a juror raises a presumption of prejudice which the Government has the burden of overcoming was stated by this Court in the following language:

> "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant."
>
> *Remmer v. United States* (1954) 347 U.S. 227, 229.

The communications with the jurors in this case were prejudicial to petitioner in four different respects, as more specifically discussed below.

1. The implication that petitioner had evaded his taxes on the sale of Cal-Neva Lodge was never negatived.

Satterly clearly implied to Smith that petitioner (whom he allegedly knew "very well") had evaded his taxes on the sale of Cal-Neva Lodge. That is the obvious interpretation of Satterly's statement to Smith (R. 167):

"I know Bones Remmer very well. He sold Cal-Neva for $850,000 on top of table—believe he got $350,000 under the table—Has about $300,000 that he daresn't touch—Why don't you make a deal with Bones?"

Petitioner was on trial for tax evasion. The reference to "under the table" money has an obvious reference to tax evasion, as does the mention of money "he daresn't touch". Moreover, petitioner's interest in Cal-Neva during the prosecution years and his subsequent sale of it were constantly before the jury in the trial. Without any discussion of the possible impact of these statements on Smith, the District Judge's opinion simply finds that "under all the circumstances, it was harmless" (R. 39). But the Court does not state what these "circumstances" are, and examination of the Record shows that there is no evidence whatsoever in the Record to support this conclusion. Smith did not mention these Cal-Neva references when he reported the incident to the Trial Judge; rather he spoke only of the bribery suggestion (R. 55-6, 134, 139). When the Government presented Smith as a witness at the hearing, he again mentioned only the bribery suggestion (R. 52), and Government counsel made no reference whatsoever to the Cal-Neva portion of the conversation, notwithstanding the fact that (as developed later in the hearing) the FBI report (Ex. D, R. 166-8, particularly 167) showed that this statement had been made.

On the following day of the hearing, after the testimony of FBI agent Callister developed the fact that these damaging accusations of tax evasion on the Cal-Neva sale had been made, Smith was not recalled as a witness, and,

accordingly, there is no testimony whatsoever in the Record as to the possible effect which this statement might have had on him.[2]

The fact that this statement had been made was discovered by the Government on December 22, 1951, when FBI agent Callister talked to Smith. If Smith had promptly been advised that Satterly was lying when he told Smith that he knew petitioner "very well", and if Smith had further been advised that there was no truth in Satterly's statement that petitioner had received $350,000 "under the table" in connection with the Cal-Neva sale, there would now be some basis for contending that the prejudicial effect of these statements had been overcome. Or if the Record showed that Smith had known of the falsity of these statements because of other sources of information, that also might have furnished the basis for concluding that Satterly's statements were harmless. The Record, however, is completely devoid of any evidence whatsoever which has even a remote bearing on the effect which these false accusations had on the juror.

We think the key to the District Court's light dismissal of these highly prejudicial remarks lies in a misconception as to the scope of the hearing. At the conclusion of the evidence and just prior to oral argument, the Court

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[2]Respondent suggests in its Brief in Opposition (p. 13, fn. 14) that petitioner should have recalled Smith for further cross-examination if this matter were considered important. This, however, assumes that the burden of proof was on petitioner, and, more importantly, it overlooks the fact that the only way the prejudicial effect of this damaging statement could have been overcome would have been to have neutralized it in Smith's mind during the trial itself.

stated (R. 275) that in its view the Supreme Court's remand

> "was not for the purpose of considering whether or not the contact of the witness Satterly with a juror was harmful or not. They have remanded it for the purpose of determining whether the contact of the FBI agent to the juror was harmful. That is the way the opinion reads to me."

As set forth below, we believe this restrictive interpretation of the remand is erroneous.

2. The evidence does not establish that Satterly's "bribery" proposal was harmless.

It should be noted that nowhere in the "Opinion, Findings and Order" is there a finding that Satterly's "bribery" proposal was harmless in its impact on Smith. The absence of such a finding no doubt stems from the lower Court's belief, as stated during the hearing (R. 275) and as reflected in its Opinion, that the hearing was limited to the effect on Smith of the FBI investigation.

But even if such a finding had been made, it would be without evidential support. The lower Court's opinion recites that Smith regarded the comment as "jocular" (R. 35), but the Record shows that neither Smith nor anyone else *treated* the incident as a joke, and respondent now concedes that Smith at least "had some lingering doubt". (Br. in Opp., p. 12).

Note, preliminarily, that Smith described Satterly not only as a business client but also as a sportsman who

had shared Smith's hobby of hunting and fishing. He knew Satterly "quite well", discussed their mutual hobby with him from time to time, and the two families had spent time together at a hunting club (R. 51, 130).

Despite this close business and personal relationship, Smith noticeably raised his voice in admonishing Satterly that he could not discuss the case (R. 128). And this "joke" disturbed him so much that after mulling it over for two days, and feeling the need for "some counsel relative to it", he decided to discuss it with Judge Foley, since he did not feel free to talk either to his wife or to his attorney (R. 54).[3]

Smith says Judge Foley told him to regard the incident as a joke (R. 56). But whatever curative effect this might have had was certainly dispelled two days later when the FBI agent called on him. How could he possibly have felt satisfied then that the Government thought this to be a joke?

The subsequent actions of the Government representatives are also revealing. The FBI investigation was not closed after the interview with Smith on December 22, 1951. Rather, it was held open until March 10, 1952 (16 days after the verdict), and only then was the decision made that no further investigation was warranted.

Thus, the FBI continued to look over Smith's shoulder until the verdict came in. Whether they would have

[3]He did this even though he knew at the time that he was not required by the Trial Judge's instructions to report such incidents unless the party "persisted" in discussing the case after being advised that such discussion was improper (R. 53-4).

dropped the investigation had Remmer been acquitted is problematical—but the fact remains that, all during the trial, Smith was left uneasy as to how the Government interpreted the incident, what Satterly had told the FBI (it anything), and whether a vote for acquittal would mean further questioning by the FBI. None of this supports the "joke" theory.

If the Trial Judge and prosecutors had really considered the whole thing a "joke", would they not have terminated the investigation right then, instead of delaying the decision for two months, until after the conviction? And would they not have informed Smith promptly so that he could relieve himself of the anxiety and concern which had prompted him to report the incident?

Moreover, the Trial Judge and prosecutors, if they had really concluded that this was a "jocular" incident, would also have advised defense counsel of the incident, so that petitioner's rights could have been protected fully. We repeat here that the reason given by the Trial Judge and the prosecutor for not informing petitoner's lawyers was that to do so might frustrate the investigation (R. 137, 228).

The plain and obvious fact is that the Trial Judge and prosecutors thought a possible attempt had been made to bribe the jury, and this thought was not abandoned until *after* the jury had convicted petitioner.

Thus, instead of minimizing or neutralizing any thought on the part of juror Smith that he had been the object of a bribery attempt, the conduct of the Trial Judge, the prosecutor and the FBI served to emphasize the possibility that the bribery suggestion was a serious one. This

obviously must have magnified, rather than removed, the prejudicial effect of the incident.

3. The pendency of the FBI investigation throughout the balance of the trial deprived petitioner of his right to an impartial jury.

After the FBI agent had interviewed Smith, the prosecutor and the Trial Judge decided to suspend further investigation until after the trial, and the matter remained pending until after petitioner was convicted. During this entire period of two months, no further statement was made to juror Smith regarding the matter, and he was not advised as to whether the FBI had reached any conclusions, and, if so, what they might be. A juror cannot be expected to free himself of the obvious restraint and concern which such a situation creates. This Court recognized the error which is inherent in this practice in the following statement in its prior opinion in this matter:

> "The sending of an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder."
>
> *Remmer v. United States* (1954) 347 U.S. 227, 229.

The lower Court's opinion disposes of this Court's statement in the following manner (R. 37):

> "It is not true that the FBI agent was sent to investigate the foreman of the jury as to his conduct, as was conjectured in the opinion of the Supreme Court (p. 229). There is not the slightest doubt, and I so find, that the purpose of the investigation was to determine whether or not *Satterly* had committed an offense."

The opinion of the District Judge also describes the FBI interrogation of Smith in the following words (R. 35):

> "Mr. Callister then interviewed Foreman Smith, advising him at the time that he, Smith, was not being investigated, but that the FBI was making an investigation to determine whether or not there had been a violation of law by Satterly."

This attempt to compartmentalize an FBI inquiry is completely unrealistic and presupposes superhuman objectivity and freedom from anxiety on the part of a juror.

To begin with, the statement of FBI agent Callister to Smith was not quite as set forth in the portion of the District Judge's opinion just quoted. On direct examination, Mr. Callister stated that he had explained the purpose of his visit to Smith in the following words (R. 152):

> "I told him I had been requested to conduct an investigation relating to his talk with Mr. Satterly and the possibility of an improper approach."

At the conclusion of Mr. Callister's cross-examination, he made substantially the same statement in response to a question from the Court, as follows (R. 169-170):

> "Q. (By the Court): Will you tell me precisely what you said to Mr. Smith as to the object of your inquiry of him?
>
> A. I told him that the matter had been referred to me by the United States attorney, in which he told me that Judge Foley would like to have some inquiry made as to this talk with Mr. Satterly, to determine whether an attempt had been made to exert any influence on a juror at a trial before Judge Foley."

The Court then continued the questioning in the following manner (R. 170):

"Q. Did you say to Mr. Smith, in either words or effect, that you were in any way investigating his conduct?

A. I know there was never any inference of attacking his conduct. The whole idea was to determine whether the person who contacted him was violating some law.

Q. Did you say that to him when you initiated the inquiry to him?

A. Did I say what?

Q. Did you say to him whether or not the inquiry which you were making was for the purpose of investigating the conduct of a man by the name of Satterly?

A. Yes, I explained that was the purpose of the investigation."

This addendum to the testimony is the basis for the finding that the Government was interested only in what Satterly had said and done and not in what Smith had said and would do. If this were the case, it seems remarkably strange that the Government made no effort to interview Satterly (R. 157), even though Smith had given Satterly's out-of-state address to the FBI agent (R. 60, 77), and had mailed Satterly an insurance policy which Satterly had received (R. 121). We think it is clear from the Record that the chief concern of the Trial Judge and the prosecutors was whether the *Government* was being deprived of an impartial jury. The Government did not even interview Satterly until two and a half years later, and then apparently only in preparation for the hearing ordered by this Court (R. 120).

It is inconceivable that the FBI would have pre-judged the end result of its investigation before it interviewed any of the witnesses. What was being investigated was a possible attempt at, or a preparatory step to, a bribe. Smith's reaction to Satterly's suggestion was necessarily pertinent to this investigation. How ask Smith what he understood Satterly to mean, and his knowledge of Satterly's past and connections, if any, with Remmer or his friends, without making even a paragon of rectitude wonder whether he himself would be suspect if his verdict favored the defendant?

Suppose the agent were investigating only Satterly and Satterly's connection, if any, with the defense. That Satterly was the initial object of the investigation would provide no immunity for Smith if any grounds appeared later to indicate that Smith might be implicated. Neither Smith nor Callister knew that Satterly would not be interviewed until years later or that when interviewed he would not implicate Smith.

For all Smith knew, Satterly (a known felon[4]) might have told the FBI that Smith was the one who proposed the bribe and Satterly the one who rejected it. We remind the Court that when Satterly finally was interviewed, he disagreed sharply with Smith and denied (with his wife's corroboration) that the incident had ever occurred (R. 114, 118, 125).

That Satterly's, rather than Smith's, possible connection with the defense were being investigated, would to no degree prevent Smith receiving an impression prejudicial to the defendant from a unilateral interrogation by

[4]Smith told the FBI agent that Satterly had served time in a penitentiary (R. 168).

a Government agent. In the long weeks of the trial between the original contact and the verdict it would have been only human for Smith to wonder whether in fact the defense was responsible for Satterly and whether the FBI thought he (Smith) had any culpable part in it. For aught Smith knew (information being conspicuously absent after he had told Callister all he knew of Satterly), the FBI was only waiting to see whether he voted for or against Remmer before making its final evaluation of the whole incident.

That the incident actually remained on the top of Smith's mind is shown by the fact that on the way home from the Court, immediately after the verdict, two whole months later, he told juror Tinkham that it was possible he had been approached (R. 184) and he thanked juror Mack for finding Remmer guilty and said that some day he would tell her why he was so interested (R. 174, 177-8). Two weeks later, when he encountered alternate juror Morris, he related that he had been told during the trial that he could make a lot of money by stringing along with Remmer (R. 221).

4. The Curnow-Boyd incident was not shown to be harmless.

Whether Deputy Marshal Boyd's private communication with juror Curnow was within the scope of the hearing is discussed below. In this section of our brief, we point out that there is no factual basis for considering the incident harmless. Whatever the exact details may have been, it is clear that the deputy marshal said something to Curnow which led the latter to believe that an attempt had been made to influence one of the other jurors (who Curnow thought at the time was Mrs. Mack).

The prejudicial effect of such a statement to a juror by a deputy marshal who is also a personal friend is too obvious to need elaboration. Even if an effort had been made to overcome this prejudicial effect by a full hearing during the trial, it is doubtful if the prejudice could have been removed. See, for example, *Stone v. United States* (CA 6, 1940) 113 F. 2d 70, where the conviction was reversed, even though the trial judge immediately notified the defense and did everything in his power to neutralize the prejudicial effect of the attempted approach.

But here, there was no neutralization of the remark, and it remained with the juror throughout the trial untarnished by any attempted correction or retraction. The following language of the *Stone* case is even more appropriate here than in the facts of the *Stone* case:

> "* * * it is essential to faith in the jury system that jurors should determine the facts submitted to them wholly on the evidence offered in open court, unbiased and uninfluenced by anything they may have seen or heard outside of the actual trial of the case.
>
> There is no right more sacred than the right to a fair trial. There is no wrong more grievous than its negation.
>
> * * * the object of a jury trial would be subverted if they were allowed to communicate with other persons, or other persons to communicate with them, unless for some purpose of necessity and in the presence of the court.
>
> Any course is clearly illegal which would expose them to the danger of influence outside the court. *If a single juror is improperly influenced, the verdict*

is as unfair as if all were. The presumption is always in favor of good character but the law concerning juries provides strictly that all jurors be secluded from outside influences and *presumes that such influence may act upon some of them, and may act so as to be beyond detection. Stone v. U.S.* 113 F.(2d) at 77. (emphasis supplied)."

B. THE LOWER COURT APPLIED INCORRECT RULES AS TO THE EFFECT OF THE PRESUMPTION OF PREJUDICE.

1. The lower Court refused to follow the rule that the presumption of prejudice requires a new trial unless the circumstances foreclose any reasonable possibility of harm.

The rule consistently followed by the cases which have passed on this question is that upon a showing of extraneous communications of a serious nature relating to the case (as distinguished from trivial departure from formalities or casual conversation unrelated to the defendant or to the case) the presumption of prejudice requires a new trial, unless the circumstances foreclose any reasonable possibility of harm.

Stone v. United States (CA 6, 1940) 113 F.2d 70, 77;

Little v. United States (CA 10, 1934) 73 F.2d 861, 865;

Rabenstein v. United States (CA 10, Sept. 1, 1955) — F.2d —, 55-2 U.S.T.C. Par. 9708;

Ryan v. United States (D.C.Cir. 1951) 191 F.2d 779, 783;

United States v. Marine (D.C.Del. 1949) 84 F. Supp. 785, 787.

In the language of the *Stone* case (113 F.2d at 77):

> "The question is, not whether any actual wrong resulted from the conversation * * * under the circumstances related, but whether it created a condition from which prejudice might arise. * * *"

The District Judge's opinion here specifically rejects this rule of law in the following language (R. 38):

> "But that means that decision would rest on conjecture and hypothesis and not fact. The Supreme Court had the power to decide the question involved as a matter of law. It did not do so. Hence our decision must be on fact."

A similar and even more pointed rejection of the *Stone* case is found in the District Judge's comment on that case during oral argument, where he stated that the *Stone* case was "inconsistent in legal reasoning" and would require the Court to "enter the field of speculation" (R. 318).

The lower Court's refusal to follow the objective test of whether the evidence foreclosed all reasonable possibility of prejudice, and its determination that there was in fact no harmful impact, is squarely contrary to the reasoning of the *Stone* case that bias and prejudice are often unconscious, that "inward sentiments cannot always be ascertained", and that whether a juror "leaned one way or the other because of the occurrence, is beyond ascertainment" (113 F.2d at 77).

In *United States v. Marine* (D.C.Del. 1949), 84 F.Supp. 785, 787, the Court says:

"The only question here is whether the circumstances detailed at the hearing *affirmatively* indicate that no prejudice *could* result to the defendant." (Emphasis supplied.)

See, also, *Little v. United States* (CA 10, 1934) 73 F.2d 861, 865:

"There is nothing * * * in this record to support a finding * * * that the error was *necessarily* harmless." (Emphasis supplied.)

See, also,

Mattox v. United States (1892) 146 U.S. 140;

United States v. Rakes (E.D.Va. 1947) 74 F.Supp. 645.

Actually, the "conjecture and hypothesis" lie not in the objective rule of the *Stone* and similar cases, but rather in the statement of the lower Court here that the extraneous contacts were "entirely harmless * * * and did not have the slightest bearing upon the integrity of the verdict nor the state of mind of the foreman of the jury, or any of the members of the jury." (R. 38.)

The impact on a juror's mind of what occurs in a case is not so easily known.

"Jurors are human and are not always conscious to what extent they are in fact biased or prejudiced, and their inward sentiments cannot always be ascertained. In the present case, *the juror commendably showed anxiety at the approach to him concerning the case and whether he leaned one way or the other because of the occurrence, is beyond ascertainment.*" (Emphasis supplied.)

Stone v. United States, 113 F.2d at 77.

Once the nature of the extraneous contacts was developed in the Record, and it became evident that they involved communications of a very serious nature (viz., a possible bribery approach, a statement by an alleged friend that petitioner had concealed $350,000 of profit on the sale of Cal-Neva, and a report to another juror that bribery had been attempted—the seriousness of all of which was emphasized by the making of inquiries by the FBI and the deputy marshal), the question became: was the possibility that Smith or Curnow was left with a conscious or subconscious bias against petitioner, or a fear that the Government might be suspicious if they voted for petitioner, removed beyond reasonable doubt?

"Evidence beyond reasonable doubt" is a time-honored objective standard well understood by the courts. It has been made the criterion of prejudice in jury contact cases because it avoids the conjecture of what subjectively lies in the juror's mind, which is actually "beyond ascertainment."

Thus, the lower Court's holding here itself rests on the conjectural and speculative basis which the authorities uniformly reject.

We have found no case which rejects the rule stated above, nor is there any case to our knowledge which applies a contrary rule.

There are, of course, cases in which the extraneous conversations are clearly unrelated to the case on trial or obviously free of possible ulterior motive, and cases in which the defense has knowledge of the communication but does not object, or in which, for example, the judge

makes a routine inquiry at the door of the jury room which he could have made in the courtroom and which could not possibly be interpreted as covert.

See

United States v. Compagna (CA 2, 1944) 146 F.2d 524;

Higgins v. United States (D.C.Cir. 1946) 160 F.2d 222 (for facts see *Higgins v. United States* (D.C. Cir. 1946) 160 F.2d 223);

Ryan v. United States (D.C.Cir. 1951) 191 F.2d 779.

But in these cases as well as in those which reverse for prejudicial error, the rules are stated as hereinabove quoted. As far apart as the poles are the facts in the *Remmer* case and those in the *Compagna* case relied on by the District Judge (R. 39). In the *Compagna* case the judge on his way to lunch stopped at the door of the jury room and asked if the note the jury had sent him meant that they wanted certain testimony read to them, and upon receiving an affirmative answer told the jury the testimony would be ready and read to them after lunch; of this innocent incident (of which, moreover, the defense apparently was aware at the time and made no objection) the Court in the *Compagna* case says at page 528:

> "... it is most undesirable that anything should reach a jury which does not do so in the courtroom. This is, indeed, too well settled for debate. Mattox v. United States, 156 U.S. 140, 150; 13 S. Ct. 50; 36 L.ed. 917; Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 81; 39 S. Ct. 435; 63 L.ed. 853; Dodge v. United States, 2 Cir., 258 F. 300, 303, 304; 7 ALR

1510; Little v. United States, 10 Cir., 73 F.2d 861, 864, 865; 96 ALR 889. But, like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity. Dodge v. United States, supra, 258 F. 300; 7 ALR 1510; Rice v. United States, 2 Cir., 25 F.2d 689, 696; United States v. Graham, 2 Cir., 102 F2d 436, 444. There cannot be the slightest doubt here that the informality—for, at most, it was no more—did not prejudice the accused."

Similarly, in the *Ryan* case the extraneous contact was unrelated to the case and clearly involved no implication adverse to the defendant, nor did it cast any reflections on his honesty or integrity. In upholding the Trial Judge's conclusion that the presumption of prejudice had been overcome, the Court of Appeals specifically and pointedly approved the rule of the *Stone* case, and declared that, since an overture in the nature of bribery was involved there, the Court had *properly* applied the principle that reversal is required unless it is shown that "no injury *could* have occurred." *Ryan v. United States*, 191 F2d at 783. (Emphasis added.)

The distinction made in the *Ryan* case is clear. A showing that the extraneous communication was free of any implications adverse to the defendant warrants a finding that no prejudice occurred in fact. But if the extraneous communication contains prejudicial material, relating either to the case or to the defendant's character, the presumption of prejudice can be overcome only by a showing that there is no reasonable possibility that prejudice occurred.

Respondent's Brief in Opposition (p. 14, footnote 15) seeks to distinguish the *Stone* case upon the ground that it would have been decided differently had not the Trial Judge interrogated each of the jurors. While that is what happened in that case, there is nothing in the opinion to indicate that that fact is decisive; on the contrary, it is expressly noted (113 F.2d at 77) that "If a single juror is improperly influenced, the verdict is as unfair as if all were."

> "It is an axiomatic principle firmly embedded in the field of fundamental law that it is vital to the judicial system that a jury shall determine the case free from external causes which tend to disturb the full and untrammelled exercise of deliberate and unbiased judgment, and that no ground of suspicion that the administration of justice has been thwarted by deliberate interference with that function of the jury can be tolerated. Within the range of that general rule lies the interdiction upon a party litigant subjecting members of the jury to critical surveillance for the purpose of ascertaining their acts and conduct while serving on the jury."
>
> *Rubenstein v. United States*, (CA 10, Sept. 1, 1955) ..... F.2d ....., 55-2 U.S.T.C. Par. 9708.

In the *Rubenstein* case, the Treasury Agents and the grand jury had previously questioned the jury panel from which the *Rubenstein* trial jury had been drawn to determine whether any of them had been approached on behalf of a defendant in a prior unrelated case. Although it was stipulated on appeal that each juror had replied in the negative, and a transcript of the grand jury proceedings was made a part of the appellate record, the Court re-

manded the case for a hearing, with directions to grant a new trial if these incidents "did affect *or reasonably tended to affect* the full and free exercise of the calm and informed judgment of *any* member or members of the jury. * * *" (Emphasis added.)

2. The lower Court erroneously considered the presumption of prejudice as purely procedural.

A reading of the comments of the District Judge during the course of oral argument as to the effect of the presumption of prejudice in this case clearly shows that in making its findings the Court considered that once the evidence was presented the presumption of prejudice disappeared and the inquiry became simply whether the evidence showed that the defendant was in fact harmed (R. 314-319). The following excerpts from the statements of the District Judge will show that his view of the presumption was simply that it required the Government to come forward with the evidence; and that, once the facts had been made a matter of record, the presumption of prejudice had no effect, the risk of non-persuasion was on the defendant, and a new trial was to be granted only if the facts persuaded the Court that the defendant had been harmed:

> "* * * However, when all of the facts were exhibited, as they would be on a motion for a new trial, we then have to determine, as a matter of fact, rather than as a matter of law, whether or not the facts as stated showed that there was harm or not to the defendant. Now isn't it important, in resolving that issue, to show whether or not the facts as presented indicate any harm to the defendant." (R. 315.)

* * * * * * *

"* * * Are we not then confined to the question of fact, as to whether or not the juror was influenced *in such a way as to be harmful to the defendant, not in such a way as his judgment might not have been affected in one way or another*, but it was affected in such a way *as was harmful to the defendant*. I think in the last analysis that is the problem that is presented here. * * *" (R. 315-6.) (Emphasis supplied.)

"* * * so when the Supreme Court has relegated this matter for a factual hearing, which is a proper hearing on a motion for a new trial, and while there isn't much factual dispute in the case, and I think practically none in material respects, *the Court still has to determine from those facts whether or not that was in fact, on the basis of those facts, a situation that was harmful to the defendant.*" (R. 316.) (Emphasis supplied.)

In short, the District Judge's view of the issue was that the Government was required to show the facts, but that the facts, when established, had to show prejudice affirmatively before a new trial would be granted, as distinguished from granting a new trial unless the facts affirmatively showed the absence of prejudice. This is contrary to the law of the case, as stated in the opinion of this Court, as follows (347 U.S. at 229, emphasis supplied):

"* * * *The burden rests heavily upon the Government to establish* * * * *that such contact with the jury was harmless to the defendant.*"

C. THE LOWER COURT MISCONSTRUED THE SCOPE OF THE HEARING ORDERED BY THIS COURT.

The District Judge's interpretation of this Court's mandate was that the hearing should be concerned only with the effect of the FBI agent's interview with juror Smith, and not with the Satterly-Smith and the Curnow-Boyd communications. Thus, in connection with oral argument, the District Judge stated (R. 275) that this Court's remand

> "was not for the purpose of considering whether or not the contact of the witness Satterly with a juror was harmful or not. They have remanded it for the purpose of determining whether the contact of the FBI agent to the juror was harmful. That is the way the opinion reads to me."

Similarly, he stated that the Curnow-Boyd incident was not within the scope of the remand (R. 196). (Respondent's objection to the evidence showing that contact was also based on that ground. R. 195, 199.) While the Court finally admitted the evidence, it repeated that this incident was not within the scope of the remand (R. 197) and indicated that it would be material only if directly related to the Smith-Satterly incident (R. 197-8).

This restricted view of the scope of the hearing is reflected in the fact that the District Judge's opinion (R. 33-39) is devoted almost completely to the FBI contact with Smith, in the constant reference in quotation marks throughout the opinion (six times in a seven-page opinion—R. 33, 34, 38, 39) to the phrase "the incident complained of" (with obvious reference to the FBI contact), and in the casual dismissal of the Smith-Satterly and the Curnow-Boyd incidents.

Moreover, the footnote which constitutes the only mention in the opinion of the Curnow-Boyd incident specifically declares (R. 36) that

> "* * * it had not the slightest bearing upon the subject matter of the hearing. * * *"

A reading of this Court's opinion in ordering the hearing clearly shows that the purpose of the hearing was to develop all of the facts and circumstances relating to extraneous contacts with the jurors. The phrase, "the incident complained of", which the District Judge's opinion quotes so frequently, was used in this Court's opinion interchangeably with the plural word "incidents". And the reference to the effect of an FBI investigation of a juror's conduct was only by way of illustration, not of limitation of the scope of the hearing.

This Court's prior opinion did not, of course, mention the Curnow-Boyd incident, nor was there any reference to the statement of Satterly to Smith that petitioner had received $350,000 "under the table" on the sale of Cal-Neva, but only because the denial of petitioner's request for a hearing had precluded knowledge of those facts at that time. We think it is clear from this Court's opinion that the remand was for the purpose of inquiring into all the extraneous contacts which did in fact occur.

VIII. CONCLUSION.

The prejudicial effect of these extraneous communications with the jurors, compounded by the unilateral and clandestine investigation conducted by the Government, deprived petitioner of his constitutional right to a trial by an impartial jury under due process of law. Accordingly, the judgment should be set aside and the case remanded for a new trial.

Respectfully submitted,

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